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NO. 86-742

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES A. HARRELL, ET AL.,
PETITIONERS

VS.

JAMES REEVES, ET AL.,
RESPONDENTS

VS.

RAY WILKES, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CICRUIT

RESPONDENT REEVES BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

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STATEMENT OF FACTS

On March 24, 1978, James Reeves, a black deputy sheriff employed by the Sheriff's Office of Bibb County, filed a complaint under 42 U.S.C. §§ 1981, 1983, and 42 U.S.C. § 2000e, et seq., alleging that the Sheriff of Bibb County and others were discriminating against blacks in hiring policies, testing, promotion, testing and job assignment. On the date this complaint was filed no black had ever received a promotion above the rank of patrolman.

On May 24, 1979, after extensive discovery and two hearings, a "Stipulation for Settlement" incorporating a proposed Consent Decree was proposed to and thereafter approved by District Court on June 18, 1979, after a fairness hearing.

The operative sections of the Consent Decree are as follows:

> "Part VIII - Affirmative Action-Promotion Goals.
>
> 12. A part of the objective of this Order is to achieve a workforce in which the

promotion of black employees, is equal (a) by job classification, (b) by department, and (c) by rate of pay. In furtherance of this promotion goal, during the term of this Order, defendants shall adopt the promotion goals referred to below:

A. All personnel in the Sheriff's Department will be made aware of requirements for promotion to their next highest position.

B. At least semi-annually, personnel eligible for promotion will be notified.

C. Each year at least fifty percent (50%) of the promotions will be blacks who have met the requirements for promotion to their next highest position.

D. This system is to be followed until the Court shall determine that the defendants have complied in good faith with this Order and the requirements of Federal Laws relating to employment practices."

On February 17, 1982, two years and eight months after the Consent Decree became operative James A. Harrell and James B. Dean, Jr., filed a motion to intervene.

Mr. Harrell did not apply for promotion from the date of the Consent Decree to the date the intervention was filed, although there were ten (10) promotions, and five (5) of them were awarded to white deputies who had requested promotion.

Mr. Dean applied for promotion in three (3) of the ten (10) promotions, the Sheriff denied him a promotion because of his "lack of experience". Five (5) white deputies who had the requisite "experience" were promoted. Five (5) black deputies were promoted, each had been with the Sheriff's Office longer than Dean.

Harrell and Dean sought intervention requesting that the Court discontinue the promotion provisions. They alleged that the promotion provision of the Consent Decree was discriminating against them and adversely impacting their rights and interest.

At the time of intervention it was clear the goals of the Consent Decree had not been met. No black had reached the promotional levels of Major or Captain.

On April 28, 1982, without a hearing intervention was approved.

On June 15, 1983, petitioners filed a motion to dissolve the promotion provision of the Consent Decree.

A hearing on the motion was held on August 9, 1983. The petitioners called no witnesses. The only evidence offered by petitioners was affidavits of the racial composition of the Sheriff's Department and the promotions since entry of the Consent Decree. Said evidence showed the goals of the Consent Decree had not been met.

On December 9, 1983, the District Court entered an Order dissolving the promotion provisions of the Consent Decree and Respondent black deputies appealed.

On appeal, the Eleventh Circuit reversed. Reeves v. Wilkes, 754 F. 2d 965 (11th Cir. 1985) (Reeves I). The panel found as a fact the Petitioners motion to intervene was not timely and dismissed the Petitioners. Respondent

black deputies defeated the intervention and derailed the attack on the Consent Decree.

On remand, Respondent black deputies moved for attorneys' fees against Petitioners pursuant to 42 U.S.C. § 1988. The District Court denied attorneys' fees and Respondent black deputies appealed.

The Eleventh Circuit in Reeves v. Harrell, 791 F. 2d 1481 (11th Cir. 1986)(Reeves II) reversed. The panel found: Respondent black deputies were prevailing parties under 42 U.S.C. § 1988; Petitioners should be characterized as plaintiffs in determining attorneys' fees under 42 U.S.C. § 1988. The standard of Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978) was applied in assessing attorneys' fees and the Eleventh Circuit found Petitioners' motion to intervene was frivolous.

Petitioners filed a petition for Writ of Certiorati in this Court. The only issue raised is whether Petitioners' motion to intervene was frivolous.

The Eleventh Circuit in Reeves v. Harrell, 791 F. 2d 1481 (11th Cir. 1986) (Reeves II) found the Petitioners' motion to intervene to dissolve the Consent Decree filed two years and eight months following the entry of the Consent Decree was frivolous and Petitioners' were liable for attorneys' fees incurred by Respondent Reeves who successfully defeated the intervention and defended the Consent Decree. The Eleventh Circuit stated:

> The intervenors chose to use intervention as the procedure mechanism to pursue their claims. This means, however, was clearly unavailable to them under existing case law. Therefore, the issue is not whether the intervenors' claims have merit, but whether their decision to pursue those claims by filing a motion to intervene was frivolous or unreasonable. Considering the long delay between the Consent Decree and the motion to intervene and the decision by a panel of this Court that the intervenors failed to satisfy even one prong of the four prong Monsanto test, we agree with the plaintiffs that the intervenors' attempts to

> inject their claims into this litigation was frivolous and makes them liable to the plaintiffs for reasonable attorneys' fees.
>
> 791 F. 2d at 1485

The question raised by Petitioners is whether their motion to intervene was frivolous.

Petitioners argue their motion to intervene was justified by existing case law at the time it was filed therefore the Eleventh Circuit determination their action was frivolous was unwarranted.

The standard for analyzing the timeliness of a motion to intervention at the time the intervention was filed was set forth in Stallworth v. Monsanto, 558 F. 2d 257 (5th Cir. 1977). The Stallworth decision list four factors to be considered in assessing the timeliness of an intervention.

The Eleventh Circuit in Reeves v. Wilkes, (Reeves I) 754 F. 2d 965 (11th Cir. 1985), assessed the facts of the case with the four factor test articulated in Stallworth. Each Stallworth

factor was examined separately and applied to the facts of the case. The Eleventh Circuit found the Petitioners failed to meet any part of the four factor test.

Reeves I did not represent a departure from the requirement of Stallworth. Petitioners failed to meet the standards of existing case law at the time the intervention was filed. There was no ex post facto application of case law.

The Stallworth decision was the case law at the time the intervention was filed and the Stallworth factors were applied in this case. Petitioners are asking for a reassessment of the facts of this case with the existing case law at the time the intervention was filed; said case law is Stallworth. Petitioners seek a different conclusion based on the facts and law considered by the Eleventh Circuit in Reeves I and Reeves II.

CONCLUSION

The Eleventh Circuit decisions in Reeves I and Reeves II were correct. The petition for a writ of certiorari to reconsider the findings of frivolousness should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert E. Steele, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for Respondents herein, hereby certify that on the December 1, 1986 pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing of the foregoing Respondent Reeves Brief in Opposition to Petition for Writ of Certiorari on each of the parties herein, as follows:

On James Harrell, et al., Petitioner herein, by depositing such copies in the United States Post Office, Macon, Georgia, with first-class postage prepaid, properly addressed to the post office address of:

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This being the above named Petitioners' counsel of record.

On Ray Wilkes, et al., Respondents herein, by depositing such copies in the United States Post Office, Macon, Georgia, with first-class postage prepaid, properly addressed to the post office address of:

Mr. O. Hale Almand, Jr.
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This being the above-named Respondents' counsel of record.

All parties required to be served have been served.

This 1 day of December, 1986.

Robert E. Steele, Jr.

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State of Georgia

County of Bibb

I, Robert E. Steele, Jr., depose and say that I am the attorney of record for the Respondent Reeves herein, and that on December 1, 1986 pursuant to Rule 28, Rules of the Supreme Court, I placed in the United States mail, with adequate first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court, forty (40) copies of the foregoing Respondent Reeves Brief in Opposition to Petition for Writ of Certiorari. To my knowledge this mailing took place within the time permitted by law for the filing of said Response.

Robert E. Steele, Jr.
ROBERT E. STEELE, JR.

SWORN TO AND SUBSCRIBED before me
this 25th day of November, 1986.

Irma Kelley
Notary Public
My Commission Expires: 4/29/89

ENTRY OF APPEARANCE

The Clerk will enter my appearance as Counsel for the Respondents:

Robert E. Steele, Jr.

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The Clerk is requested to notify counsel of action of the Court by means of regular mail.

In this case the person to be notified for Respondents is:

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